

1 UNITED STATES BANKRUPTCY COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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4 In the Matters of:

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6 SECURITIES INVESTOR PROTECTION  
7 CORPORATION,

8 Plaintiff,

9 v. Adv. Case No. 08-01789-smb

10 BERNARD L. MADOFF INVESTMENT

11 SECURITIES, LLC, ET AL,

12 Defendants.

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14 IRVING H. PICARD, TRUSTEE FOR THE

15 LIQUIDATION OF BERNARD L. MADOFF

16 INVESTMENT SECURITIES, LLC, ET AL,

17 Plaintiff,

18 v. Adv. Case No. 10-04898-smb

19 SAREN-LAWRENCE

20 Defendant.

21 - - - - - x

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1 IRVING H. PICARD, TRUSTEE FOR THE  
2 LIQUIDATION OF BERNARD L. MADOFF  
3 INVESTMENT SECURITIES, LLC, ET AL,  
4 Plaintiff,

5 v. Adv. Case No. 10-04946-smb  
6 GOLDENBERG,  
7 Defendant.

8 - - - - - x

9 IRVING H. PICARD, TRUSTEE FOR THE  
10 LIQUIDATION OF BERNARD L. MADOFF  
11 INVESTMENT SECURITIES, LLC, ET AL,  
12 Plaintiff,

13 v. Adv. Case No. 11-02760-smb  
14 ABN AMRO BANK N.V.,  
15 Defendants.

16 - - - - - x

17 IRVING H. PICARD, TRUSTEE FOR THE  
18 LIQUIDATION OF BERNARD L. MADOFF  
19 INVESTMENT SECURITIES, LLC, ET AL,  
20 Plaintiff,

21 v. Adv. Case No. 10-04377-smb  
22 NELSON, ET AL,  
23 Defendants.

24 - - - - - x

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1 IRVING H. PICARD, TRUSTEE FOR THE  
2 LIQUIDATION OF BERNARD L. MADOFF  
3 INVESTMENT SECURITIES, LLC, ET AL,  
4 Plaintiff,

5 v. Adv. Case No. 10-04658-smb  
6 NELSON,  
7 Defendant.

8 - - - - - x

9 IRVING H. PICARD, TRUSTEE FOR THE  
10 LIQUIDATION OF BERNARD L. MADOFF  
11 INVESTMENT SECURITIES, LLC, ET AL,  
12 Plaintiff,

13 v. Adv. Case No. 10-04728-smb  
14 DIGIULIAN,  
15 Defendant.

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18 U.S. Bankruptcy Court  
19 One Bowling Green  
20 New York, NY

21  
22 May 31, 2017  
23 10:40 AM

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1 B E F O R E :

2 HON STUART M. BERNSTEIN

3 U.S. BANKRUPTCY JUDGE

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1 Hearing re: Discovery Conference re Subpoenas to Depose  
2 BLMIS Employees

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4 Hearing re: Discovery Conference to Request to Set Single  
5 Rebuttal Expert Report Deadline

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7 Hearing re: Discovery Conference re Application of  
8 Discovery Arbitrator's Orders

9  
10 Hearing re: Adversary proceeding: 10-04898-smb Irving H.  
11 Picard, Trustee for the Liquidation of B v. Saren-Lawrence.  
12 Pre-Trial Conference

13  
14 Hearing re: Adversary proceeding: 10-04946-smb Irving R.  
15 Picard, Trustee for the Liquidation of B v. Goldenberg.  
16 Pre-Trial Conference

17  
18 Hearing re: Adversary proceeding: 11-02760-smb Irving H.  
19 Picard, Trustee for the Liquidation of B v. ABN AMRO BANK  
20 N.V. Conference re Status of Memorandum Decision Denying  
21 Certification

22  
23 Hearing re: Adversary proceeding: 10-04377-smb Irving H.  
24 Picard, Trustee for the Liquidation of B v. Nelson, et al.  
25 Pre-Trial Conference

1 Hearing re: Adversary proceeding: 10-04658-smb Irving H.  
2 Picard, Trustee for the Liquidation of B v. Nelson, et al.  
3 Pre-Trial Conference

4  
5 Hearing re: Adversary proceeding: 10-04728-smb Irving H.  
6 Picard, Trustee for the Liquidation of B v. Digiulian.  
7 Cross-Motion to Dismiss

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9 Hearing re: Adversary proceeding: 10-04728-smb  
10 Motion for Substitution of Defendant

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25 Transcribed by: Tracey Williams, Nicole Yawn

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1 P R O C E E D I N G S

2 THE COURT: Please be seated. I apologize for the  
3 lateness. Madoff.

4 MR. JACOBS: Good morning, Your Honor, it's Edward  
5 Jacobs for the trustee. We have a number of matters on the  
6 agenda for today.

7 THE COURT: Well, we can deal with the ones that  
8 involve Ms. Chaitman, so then she can get out of here.

9 MR. JACOBS: Okay.

10 MS. CHAITMAN: I think most of these are my  
11 motions actually, Your Honor.

12 THE COURT: Well, they're conferences, I guess.  
13 But go ahead, if you want.

14 MR. JACOBS: Your Honor, we're here today asking  
15 for three forms of relief on various discovery disputes that  
16 we have with Ms. Chaitman. The question before the Court  
17 today is whether at this juncture, seven years into these  
18 cases, three to five into discovery, we are going to  
19 continue to expand the scope of discovery or if we should be  
20 narrowing it in an effort to move these cases forward and  
21 wrap them up.

22 THE COURT: Okay, but why don't we deal with the  
23 specific -- the three specific issues --

24 MR. JACOBS: Sure.

25 THE COURT: -- that have been raised.

1 MR. JACOBS: The first issue, Your Honor, is our  
2 --

3 MS. CHAITMAN: Your Honor, if I may, may I --  
4 since I asked for --

5 THE COURT: Yeah, let her go -- why don't we start  
6 with the single rebuttal expert bit.

7 MS. CHAITMAN: Sure. If I could just set this in  
8 context, Your Honor. When the trustee started the adversary  
9 proceedings, he announced to all the defendants that all of  
10 the documents they could possibly want were in the e-data  
11 room and he then produced, for apparently a fee of over \$30  
12 million, the report of Bruce Dubinsky, which was touted as  
13 the be-all-and-end-all on the Madoff fraud. However, it  
14 became apparent that the trustee never gave Mr. Dubinsky any  
15 of the trading records that predated 1992. And that became  
16 clear when we deposed Mr. Madoff and Mr. Madoff totally  
17 destroyed the Dubinsky report with respect to the 1980s  
18 trading. It's really shocking, it was shocking, Your  
19 Honor --

20 THE COURT: I read it.

21 MS. CHAITMAN: Okay, to see the mistakes that Mr.  
22 Dubinsky made. And --

23 THE COURT: Let's talk about the single -- let's  
24 talk about the issues that you've raised --

25 MS. CHAITMAN: Okay.

1 THE COURT: -- I'm familiar with the background.

2 MS. CHAITMAN: Okay. So when I was before you on  
3 May 17th, 2016 on my motion to compel the trustee to produce  
4 documents to us and other issues, Your Honor said to the  
5 trustee and I quote -- well, you said in court, "If the  
6 trustee has additional documents, he's got to supplement the  
7 disclosure or the production, which he does by adding them  
8 to the data room." The trustee completely ignored what you  
9 said.

10 THE COURT: What does this have to do with your  
11 request for a single date for an expert deadline?

12 MS. CHAITMAN: Because the -- every -- the  
13 discovery is ongoing, until we get to the truth, which the  
14 trustee has deliberately concealed, we are unable to get --

15 THE COURT: Well, let's stop with the  
16 recriminations and all that. You want a single discovery  
17 deadline or a single deadline for expert reports, right?

18 MS. CHAITMAN: Right, because those expert reports  
19 are going to be based upon the discovery that we're now  
20 getting. The trustee -- Magistrate Judge Moss ordered the  
21 trustee --

22 THE COURT: What is the deadline that you are  
23 proposing?

24 MS. CHAITMAN: There are different deadlines --

25 THE COURT: But you're asking for single one. So

1 what triggers the deadline, that's what --

2 MS. CHAITMAN: What triggers the deadline is -- we  
3 now I believe have April 27th, I believe, of 2017 was the  
4 last production by the trustee, I hope that that concludes  
5 what they have, I hope that they haven't held anything back,  
6 but we now are trying to go through those documents. I  
7 asked the trustee to put them in the e-data room, as Your  
8 Honor had ordered them to do; they've refused to put them in  
9 the e-data room --

10 THE COURT: Ms. Chaitman, what is the date -- or  
11 the triggering event that you're proposing?

12 MS. CHAITMAN: The triggering event is our ability  
13 to question Mr. Madoff and the Madoff traders, whom we've  
14 subpoenaed, about the complete body of trading records. And  
15 I can't give you the exact date, because I don't know how  
16 long that will take.

17 I need to subpoena -- we've subpoenaed ten  
18 witnesses, we need to continue Mr. Madoff's deposition --

19 THE COURT: But my understanding is that none of  
20 the witnesses worked at BLMIS prior to 2000, right? So what  
21 are they going to know about trading records prior to that?

22 MS. CHAITMAN: Your Honor, it's not simply the  
23 trading records from the 1980s. We have evidence now that  
24 Mr. Madoff -- and he testified to this -- took \$6 billion of  
25 money from the 703 account, investors' money, and maintained

1 a portfolio of Treasury securities, some of which at a  
2 minimum appeared on the customers' statements. So --

3 THE COURT: After 1992?

4 MS. CHAITMAN: Yes. In the --

5 THE COURT: I don't recall any questioning at his  
6 deposition about events that occurred after 1992 --

7 MS. CHAITMAN: It was the last April --

8 THE COURT: -- and he didn't even challenge the  
9 Dubinsky report for after 1992.

10 MS. CHAITMAN: The April 25th -- 20 -- I can't  
11 remember if it was the 26th or the 27th, I put before Mr.  
12 Madoff a stack of Bloomberg tickets which had been executed  
13 by Frank DePasquale (ph), Eric Lipkin and Robert Romer, and  
14 I asked Mr. Madoff if these were genuine trades and he said  
15 they absolutely were. And I said but how did people on the  
16 17th floor have Bloomberg terminals? He said they had  
17 access to Bloomberg terminals. He said Frank DePasquale had  
18 one on his desk and he said that I -- he -- I," Madoff,  
19 "instructed them to use the 703 account money to purchase  
20 Treasury securities and I maintained a portfolio of \$6  
21 billion" --

22 THE COURT: This was in his first deposition?

23 MS. CHAITMAN: No, no, no, the one I just took in  
24 April.

25 THE COURT: Oh.

1 MS. CHAITMAN: He testified that he instructed the  
2 people on the 17th floor to maintain a portfolio of \$6  
3 billion of Treasury securities. We've been able to match up  
4 some of those Treasury securities to the customer  
5 statements, it's a massive process. We've also been able to  
6 match up the Treasury securities because Mr. Madoff  
7 testified, I believe on April 26th that he maintained this  
8 portfolio of 703 account T-bills at Behr Sterns, Lehman  
9 Brothers, Morgan Stanley, Fidelity, and J.P. Morgan Chase.

10 So we're poring through all these documents now to  
11 locate these and to match them up. This is an explosive  
12 discovery in this case --

13 THE COURT: And this deals with a period after  
14 1992?

15 MS. CHAITMAN: This is -- yes, yes, 19 -- well, we  
16 don't have the records for those institutions that I just  
17 recited going back to 1992, they're not in the e-data room,  
18 but we've taken the ones from 2000 on and we've been able to  
19 match them up to confirm what Mr. Madoff has said.

20 So we have explosive information that, number one,  
21 the fraud did not start until the split strike in 1992;  
22 number two, that those customers who remained in convertible  
23 arbitrage until 1997 always had executed trades, there was  
24 never fraud with respect to those; and, number three, that  
25 Madoff actually used 703 account money to purchase T-bills,

1 which if you look at the customer statements -- Your Honor,  
2 I don't know if you know this, but every December Madoff  
3 would go totally into T-bills and even at the other periods  
4 of the year he would go into baskets of stocks, but he would  
5 only do that for four or five weeks and then go out of them  
6 and put the customers into T-bills.

7 So the T-bills were the common denominator in all  
8 of these accounts and to the extent that we can establish  
9 the specific T-bills appeared on the customer statements the  
10 trustee's complaint fails. And it's not -- there's very  
11 specific information, it's the date of the purchase, the  
12 interest rate, the maturity date, we're trying to match all  
13 of that, but this is very explosive information which is  
14 completely inconsistent with what the trustee has  
15 represented.

16 Now, I don't know how long it will take me to get  
17 through this, but I want to be able to question the traders,  
18 I want to be able to question Mr. Madoff, and we're poring  
19 through millions of pages of documents in order to put all  
20 this together.

21 THE COURT: Okay.

22 MR. JACOBS: Your Honor, if I may? None of that  
23 has any basis in fact or even in the basis of Mr. Madoff's  
24 testimony, which we contend whatever he may have said is for  
25 the most part completely fraudulent --



1 THE COURT: Well --

2 MR. JACOBS: -- in any event. I would like --

3 THE COURT: -- I'll decide that after trial.

4 MR. JACOBS: Understood. I would like to correct  
5 the record. There was never a motion to compel the trustee  
6 to produce any documents pending in this Court, that's a  
7 fiction.

8 THE COURT: But I thought I directed you to  
9 produce the documents.

10 MR. JACOBS: We said that when the Court allowed  
11 the deposition of Mr. Madoff for the specific, narrow  
12 purpose of examining as a preliminary matter, as a precursor  
13 to an omnibus fraud trial, the start date of the fraud and  
14 the Court opened the door to that evidence, we undertook a  
15 voluntary effort to search for and identify any material  
16 that we may have in BLMIS' possession that would evidence  
17 trading --

18 THE COURT: Did Ms. Chaitman --

19 MR. JACOBS: -- from that period.

20 THE COURT: -- did Ms. Chaitman ever ask for  
21 trading records in any of her discovery requests?

22 MR. JACOBS: She did. She's been asking for  
23 trading records for a very long time, for a couple of years  
24 now, starting with the subpoena she served on the Depository  
25 Trust Clearing Company. That subpoena was limited in time

1 for 2002 to 2008. We had already served our own subpoena on  
2 that entity and produced all of that material. She later  
3 expanded the scope of that inquiry to periods prior to 2002.  
4 We undertook a diligent and reasonable search for those  
5 records, there weren't any, so we didn't produce any.

6 Then the Court allowed Mr. Madoff's deposition on  
7 the narrow issue of the start date of the fraud. We  
8 voluntarily represented in both this Court and before Judge  
9 Moss, the discovery arbitrator, that we would voluntarily  
10 undertake an effort to look again for any third party  
11 verifiable trading records that would evidence real  
12 securities being bought or sold on behalf of IA customers  
13 and there weren't any.

14 We have produced recently, in the past six months  
15 since we took all of these issues to the discovery  
16 arbitrator, a lot of additional documents, but those are  
17 various iterations of BLMIS reports, very much like the  
18 customer statements, very much like the reports that are in  
19 the data room, very much like the tens of thousands, if not  
20 hundreds of thousands of documents we've already produced  
21 and made available in this litigation that we restored from  
22 microfilm at the cost of about half a million dollars in  
23 another attempt to try to find earlier trading records and  
24 they don't exist because there was no trading for those  
25 customers.

1 THE COURT: We're getting a little off track here.

2 I started to ask what is --

3 MR. JACOBS: Yeah, I've got to talk.

4 THE COURT: -- if we were going to have a single  
5 response date in her cases --

6 MR. JACOBS: Right.

7 THE COURT: -- because she's probably going to  
8 serve the same expert report in 87 cases --

9 MR. JACOBS: Right.

10 THE COURT: -- what do you propose be the  
11 triggering date for that?

12 MR. JACOBS: So our proposal, Your Honor, is that  
13 we've talked in this court with Ms. Chaitman about having an  
14 omnibus fraud trial, we want to try that issue once with all  
15 of the relevant eligible parties at the table, we don't want  
16 to do it piecemeal through her cases and then Ms. Neville's  
17 cases and then --

18 THE COURT: Well, this is just the exchange of  
19 expert reports.

20 MR. JACOBS: Right. Well, the problem is --

21 THE COURT: We're going to try it once, but she  
22 wants a single date to -- and it's not unreasonable in her  
23 87 cases --

24 MR. JACOBS: Right.

25 THE COURT: -- to file a deadline date.

1 MR. JACOBS: Well, Your Honor, her request only  
2 pertains to cases that Your Honor has allowed to participate  
3 in the Madoff deposition and that's a subset of her active  
4 cases, and that's fine, we're not opposed to having a  
5 coordinated expert schedule that would include as part of an  
6 omnibus proceeding the disclosure of an expert in chief,  
7 rebuttal experts and then possibly reply reports.

8 THE COURT: You mean for all defendants who are  
9 involved in this?

10 MR. JACOBS: Correct, for all defendants. So that  
11 would reset any of her cases that are still open and  
12 eligible for participation in that proceeding to that common  
13 schedule that would also include additional defendants --

14 THE COURT: But she also has cases that are and  
15 the only question is does it make sense to have a single  
16 date by which she produces her expert reports in 87 cases?

17 MR. JACOBS: It would make sense as part of an  
18 omnibus proceeding where the issue was going to be litigated  
19 and litigated once.

20 THE COURT: So what do you think -- what schedule  
21 do you propose?

22 MR. JACOBS: We're drafting papers for that  
23 schedule now. What we've been waiting for, Your Honor, is  
24 the conclusion of the Madoff deposition, which has taken  
25 months --

1 THE COURT: So are you proposing that at the  
2 conclusion of the Madoff deposition --

3 MR. JACOBS: Yes.

4 THE COURT: -- we schedule omnibus submissions.  
5 You've already submitted your expert report, I don't know if  
6 you want to submit another one.

7 MR. JACOBS: Well, we anticipate we will have a  
8 supplemental report to address the specific testimony from  
9 Mr. Madoff as to the earlier period of the fraud.

10 THE COURT: So the proposal is that at the  
11 conclusion of the Madoff deposition on this one issue  
12 regarding an expert deadline, we'll reset it at the  
13 conclusion of the Madoff deposition.

14 MS. CHAITMAN: Two points, Your Honor. Mr. Jacobs  
15 is excluding all of my clients who participated in my motion  
16 to compel, which Your Honor ruled on on May 17th, 2016 --

17 MR. JACOBS: There was never any such motion, Your  
18 Honor. I apologize for interrupting.

19 THE COURT: We are going to -- this is the way  
20 this particular issue will be resolved -- we'll conclude the  
21 Madoff Department and then we'll reschedule the expert  
22 submissions and have a uniform submission date.

23 MS. CHAITMAN: For all of my clients?

24 THE COURT: For everybody.

25 MR. JACOBS: Well, Your Honor --

1 MS. CHAITMAN: And if I --

2 THE COURT: For those who are still -- for those  
3 who are participating --

4 MR. JACOBS: Well, Your Honor --

5 THE COURT: -- you know, you -- let me -- you  
6 distinguish between people who are -- who opted in, I guess,  
7 to the Madoff --

8 MR. JACOBS: Right.

9 THE COURT: -- deposition and those who didn't --

10 MR. JACOBS: Right.

11 THE COURT: -- but I'm not inclined to have  
12 different staggering dates to the submission --

13 MR. JACOBS: I under --

14 THE COURT: -- of expert reports by somebody who's  
15 representing people on both sides, that just --

16 MR. JACOBS: Right.

17 THE COURT: -- doesn't make sense.

18 MR. JACOBS: I understand, Your Honor. And there  
19 are many cases where expert discovery had long since closed  
20 prior to the time Ms. Chaitman even contemplated deposing  
21 Mr. Madoff. And the point there --

22 THE COURT: Well, we're not talking about more  
23 expert discovery -- oh, I see what you're saying.

24 MR. JACOBS: So there are several cases, several  
25 of Ms. Chaitman's cases where any -- where she strategically

1 decided not to submit any expert report and that deadline  
2 has completely closed. Three of those cases are scheduled  
3 for pretrial conferences today, they all involve cases where  
4 the relevant accounts were opened after 1992.

5 THE COURT: I saw that.

6 MR. JACOBS: Ms. Chaitman has conceded on the  
7 record that she's not contesting the fraud in the  
8 arbitration with Judge Moss for periods after 1992. She  
9 said on the record that she's not -- that she agrees with  
10 Mr. Madoff's testimony where he admits that it was a Ponzi  
11 scheme in full effect from at least 1992 forward. I mean,  
12 you know, why are we expanding the scope of this inquiry at  
13 this -- seven years into this case. I mean, Ms. Chaitman  
14 has had millions of documents produced to her, made  
15 available to her, she's had the Dubinsky report for years.  
16 The time for the types of investigations that she's just now  
17 starting to propose has come and gone, Your Honor.

18 So for cases that have closed where you didn't --  
19 where Your Honor didn't permit to participate even in the  
20 Madoff deposition, I don't think there should be any second  
21 bite at the apple and we object to that. We're trying to  
22 move these cases forward and as the next two items on the  
23 agenda will illustrate, we're having a very hard time doing  
24 that with Ms. Chaitman.

25 THE COURT: Okay.

1 MR. JACOBS: So we object to any reset on the  
2 clock on those cases where it's not timely.

3 THE COURT: Okay.

4 MS. CHAITMAN: If I may be heard for just a  
5 second. I did not concede to any of the facts that Mr.  
6 Jacobs --

7 THE COURT: I've heard you concede many times that  
8 you're not arguing that the fact that the Ponzi scheme again  
9 after 1992 -- or by 1992 or 1993 it was a full Ponzi scheme.

10 MS. CHAITMAN: Your Honor, that is not Mr.  
11 Madoff's testimony.

12 THE COURT: That's what you said, though. He's  
13 not saying what Madoff said, he's saying what you said.

14 MS. CHAITMAN: I'd like to see the transcript,  
15 because based on the --

16 THE COURT: I've seen it many times.

17 MS. CHAITMAN: Okay, but based on the information  
18 that we now have from Mr. Madoff of the Ponzi scheme, he  
19 stopped buying the trades, but the actual Ponzi scheme did  
20 not begin at that time.

21 THE COURT: But in those cases we are discovery-  
22 lapsed before this issue came up. You never sought to take  
23 Mr. Madoff's deposition; you should have taken it earlier,  
24 that's all.

25 MS. CHAITMAN: You know what, Judge, I did. If



1 you recall, when you were setting the date for Mr. Madoff's  
2 deposition in the inter-account transfer -- excuse me, in  
3 the profit-withdrawal issue, I asked at that time that we be  
4 permitted to take Mr. Madoff's deposition for purposes of  
5 the clawback, and you said, no, we'll do that later.

6 But at least you have to include people where  
7 discovery was open as of May 17th, 2016. You ordered the  
8 trustee to produce all the trading records.

9 THE COURT: Well, I don't remember what the cut-  
10 off date was. I also said that I would allow you to take  
11 the Madoff deposition, but I didn't say whether or not you  
12 could take any further discovery.

13 But what's the date -- we talked about when  
14 discovery closed, what's the date?

15 MR. JACOBS: It was -- I believe it was July 7th,  
16 the cutoff for people to participate in that deposition --

17 THE COURT: July 7th --

18 MR. JACOBS: -- was July, I think 7th --

19 THE COURT: -- 2016, right?

20 MR. JACOBS: -- 2016, correct. And then the issue  
21 came up in this rate case where the discovery was about to  
22 close there and you said that you would continue discovery  
23 for the limited purpose of allowing that dep, and that's  
24 reflected in Your Honor's order governing the --

25 THE COURT: All right.

1 MR. JACOBS: -- deposition as well.

2 THE COURT: All right. With respect to this  
3 issue, what we'll do is -- and you can embody this in an  
4 order, so we don't forget --

5 MR. JACOBS: Okay.

6 THE COURT: -- we'll reset the expert deadline  
7 after the Madoff deposition is completed as to those cases  
8 where expert discovery was not closed as of July 7th, 2016.  
9 Okay?

10 MR. JACOBS: Okay.

11 THE COURT: And embody that in the order.

12 MR. JACOBS: Thank you, Your Honor.

13 THE COURT: Next, this issue with the BLMIS  
14 employees.

15 MS. CHAITMAN: Your Honor --

16 MR. JACOBS: That's my application, Your Honor, if  
17 I may begin? It was our letter seeking permission to move  
18 to quash the subpoenas.

19 THE COURT: And what's the basis of the motion to  
20 quash?

21 MR. JACOBS: The basis of the motion to quash is  
22 twofold. First, to the extent Ms. Chaitman is seeking  
23 follow-up discovery to the Madoff inquiry regarding the  
24 start date of the fraud, additional discovery can only be  
25 served with leave of Court per Your Honor's order that

1 governed the Madoff fraud. And I know that at least in part  
2 Ms. Chaitman wishes to depose those ten individuals for that  
3 purpose because those subpoenas include a document demand  
4 that asks for the production of trades -- of documents  
5 reflecting trades for IA customers prior to 1992.

6 THE COURT: Well, I doubt they're going to have  
7 any documents.

8 MR. JACOBS: I do as well, Your Honor, considering  
9 that the earliest any of them worked at BLMIS was the year  
10 2000 and in fact several of them didn't begin work until  
11 2006 to 2008.

12 THE COURT: So you're saying that she needs leave  
13 of the Court, which would require a formal motion. What  
14 else?

15 MR. JACOBS: Correct. And then to the extent Ms.  
16 Chaitman is seeking the depositions for any of the theories  
17 she's advanced today about the later periods of the fraud, I  
18 would submit for Your Honor's consideration that this  
19 appears to be a quintessential fishing expedition. These  
20 ten individuals appear to be chosen at random and there's no  
21 indication that they have any discoverable evidence under  
22 Rule 26 which requires that discovery be relevant in  
23 proportion to the issues of the case.

24 THE COURT: How do you know unless you ask them?

25 MR. JACOBS: Well, I mean -- well, that's I guess

1 --

2 THE COURT: It doesn't have to be admissible; it  
3 just has to be relevant.

4 MR. JACOBS: Right, but I guess my question is,  
5 what is the scope of the relevant testimony that is even  
6 being sought, I don't have an understanding of that beyond  
7 the document requests that's attached to the subpoenas,  
8 which asks for evidence of House 5 trading at any given  
9 point in time.

10 Now, I'd like to just clarify the record that we  
11 have never contended that House 5 wasn't trading securities.  
12 There was a proprietary --

13 THE COURT: Is that the convertible arbitrage?

14 MR. JACOBS: That's the proprietary trading desk.  
15 There were securities traded through that portion of BLMIS's  
16 operation, but that has nothing to do with the IA customers  
17 and there's absolutely no evidence that any of those trades  
18 were ever conducted for or on behalf of any IA customers at  
19 any point in time. So it literally is a fishing expedition.  
20 And even if the Court is inclined to grant an inquiry,  
21 perhaps it would be more reasonable and consistent with the  
22 proportionality standards of Rule 26 to start with one, but  
23 to serve a subpoena on ten individuals without any  
24 articulable basis for relevance under Rule 26 seems to be  
25 blunderous.

1 THE COURT: But they worked at BLMIS, maybe they  
2 know something.

3 MR. JACOBS: I think --

4 THE COURT: Otherwise it will just be a short  
5 deposition.

6 MR. JACOBS: Well, Your Honor, may I propose that  
7 to -- well, first I think we have to resolve the issue of  
8 what evidence is being sought. If it's evidence relating to  
9 the 1992 start date of the fraud and the Court is inclined  
10 to allow one or more of the depositions, I would propose  
11 that we fold that into a coordinated discovery effort that  
12 would be governed by a court order and would include all  
13 parties eligible to participate in that fraud, not just Ms.  
14 Chaitman, so that we aren't conducting discovery piecemeal  
15 and in a duplicative fashion.

16 THE COURT: Uh-huh.

17 MR. JACOBS: And if it's related to fraud issues  
18 in general, I think our position would be the same. We're  
19 trying to find a way, if we are going to do this deposition  
20 -- and just for the record I should mention, now that the  
21 door has been opened to Madoff's testimony, we may like to  
22 depose a few additional BLMIS employees and perhaps others  
23 that have testified contrary to everything Ms. Chaitman is  
24 saying he said, and all of that -- but all of that should  
25 come under an omnibus procedural order much like we have in

1 PW that would call for a discovery period, that would call  
2 for depositions, that it would require coordination between  
3 us and all eligible parties, not just one here, one there  
4 and do this piecemeal, and we can do it once, we can do it  
5 correctly and do it efficiently and quickly. That would be  
6 my proposal.

7 So if the Court is inclined to allow the  
8 deposition, that's okay, we have -- I've stated my  
9 objection, but I propose we do it -- we defer it until after  
10 we have a hearing to discuss a procedure governing an  
11 omnibus trial and that would call for a discovery period  
12 which would include this issue.

13 THE COURT: Okay.

14 MS. CHAITMAN: Your Honor, you know, this is a  
15 search for the truth. I don't see how the trustee can  
16 object to my taking --

17 THE COURT: Well, he's just saying it should be  
18 coordinated, because it's not just you, it may be another  
19 hundred cases that want to --

20 MS. CHAITMAN: There hasn't been anyone else so  
21 far, he knows that, but in any event, Your Honor --

22 THE COURT: Well, maybe you're ahead of the crowd.

23 MS. CHAITMAN: Perhaps.

24 THE COURT: The question really is whether it just  
25 makes sense to complete Madoff's deposition and then talk

1 about further discovery.

2 MS. CHAITMAN: Well, this is the problem: we  
3 could be taking these other depositions before we take  
4 Madoff's deposition.

5 THE COURT: And then somebody else may want to  
6 take their depositions and then --

7 MS. CHAITMAN: But then we can just put everyone  
8 on notice, if they want to take the depositions, this is  
9 when they're going to be --

10 THE COURT: But some people may prefer to wait for  
11 the completion of Madoff's deposition since, you know,  
12 you're telling me it's very revealing. And I read the  
13 deposition and I understand what he's testifying to,  
14 although all his testimony at least in the first transcript  
15 was pre-1992.

16 MS. CHAITMAN: Right.

17 THE COURT: I just think it makes sense, because  
18 we keep coming back to the same issue, everybody wants to  
19 hear what Madoff has to say, for whatever it's worth.

20 MS. CHAITMAN: Okay, and that's fine, Judge --

21 THE COURT: We've already agreed that the --

22 MS. CHAITMAN: -- if you want to put it off,  
23 that's fine.

24 THE COURT: Yeah, I think that this also will just  
25 be subject to consideration and a reset, if necessary, at

1 the conclusion of the Madoff deposition. But if stuff comes  
2 up, you know, during his deposition, you can argue that  
3 people should have taken his deposition earlier. Some  
4 people did notice it on time and I don't know how you -- on  
5 a going-forward basis in a trial you're going to separate  
6 out those people who were entitled to take his deposition  
7 and those people who weren't but want to use it.

8 MR. JACOBS: Right.

9 MS. CHAITMAN: The other point I'd just like to  
10 make, Your Honor, is that these cases have never been  
11 consolidated and in fact the trustee has --

12 THE COURT: Well --

13 MS. CHAITMAN: -- insisted that they not be and --

14 THE COURT: -- they haven't, but they've been  
15 consolidated for certain purposes --

16 MS. CHAITMAN: Right.

17 THE COURT: -- for omnibus motions or this PW  
18 issue, for the start-date issue.

19 MS. CHAITMAN: Well, the profit withdrawal issue  
20 was not in the adversary proceedings, it was simply in the  
21 bankruptcy case. It's a big distinction, Your Honor,  
22 because --

23 THE COURT: Well, no, but it goes into the  
24 computation of fictitious profits also; you can't separate  
25 the two.



1 MS. CHAITMAN: Here's the issue, at least with  
2 respect to my clients, they've demanded a jury trial, which  
3 would necessitate withdrawing the reference and having a  
4 jury trial. So the key factual findings would have to be  
5 made by a jury. It's not susceptible to an omnibus  
6 proceeding where the Court would make those determinations  
7 to be binding on defendants in individual adversary  
8 proceedings.

9 THE COURT: No, you can make that argument to the  
10 District Court --

11 MS. CHAITMAN: Okay.

12 THE COURT: -- if, as and when there's a  
13 determination.

14 MS. CHAITMAN: Okay.

15 THE COURT: Okay.

16 MR. JACOBS: The -- if I may, Your Honor, the last  
17 final specifically discovery-related issue is the --

18 THE COURT: You can add this to the order, by the  
19 way --

20 MR. JACOBS: Okay.

21 THE COURT: -- so we have an order, so we don't  
22 have to read a lot of transcripts and --

23 MR. JACOBS: Okay --

24 THE COURT: -- decide who said what.

25 MR. JACOBS: -- will do. The third and final

1 specifically discovery-related issue involves Ms. Chaitman's  
2 compliance with her discovery obligations. We've focused a  
3 lot of time and energy in this court pursuant the discovery  
4 she wants to take, including Mr. Madoff's deposition, all  
5 the while she's exhibited a pattern and practice of  
6 obstructing, obstructing, obstructing the discovery we have  
7 served on her clients.

8 And I just want to remind the Court that we've  
9 sued about 1150 people and 850 of those cases are now  
10 successfully mediated, settled, and we've entered in -- in  
11 some cases we've entered into factual stipulations that have  
12 completely obviated the need for protracted discovery, in  
13 contrast to Ms. Chaitman's cases where we've been in near  
14 continuous discovery litigation for almost two years now, in  
15 the last six months before Judge Moss. I think the time is  
16 for the Court to say enough is enough. Ms. Chaitman has to  
17 provide discovery, because we've tried every which way to  
18 Tuesday --

19 THE COURT: Well, is this the discovery  
20 arbitrator's --

21 MR. JACOBS: Correct --

22 THE COURT: -- orders?

23 MR. JACOBS: -- we would like --

24 THE COURT: Okay.

25 MR. JACOBS: So the very short background there is

1 that we -- the Court approve the appointment of Judge Moss.  
2 Ms. Chaitman in the first instance agreed to arbitrate less  
3 than I think nine cases before him spanning various issues,  
4 she moved to compel a production of documents from us, which  
5 resulted in an order compelling production, which now we --  
6 Judge Moss has found we complied with. We moved to compel  
7 her to fix deficient responses to interrogatories and  
8 document requests. And then also she sought to prohibit our  
9 ability to take depositions of her clients.

10 And all of those things were arbitrated. They  
11 resulted in numerous orders, some of which were favorable to  
12 us, some of which were favorable to Ms. Chaitman, and all  
13 the while both in this court and before Judge Moss Ms.  
14 Chaitman demanded that those rulings apply with equal force  
15 and effect to all of her cases where the issues were  
16 identical and we now agree that they should. And yet after  
17 we obtained some rulings compelling her to comply with  
18 discovery, she's now taking the position that Judge Moss  
19 only had jurisdiction in those nine cases.

20 THE COURT: Is the order that you want to apply in  
21 all cases the order that says that if you don't admit --

22 MR. JACOBS: Stipulate, right.

23 THE COURT: -- stipulate to the exhibits, then  
24 it's --

25 MR. JACOBS: Right.

1 THE COURT: -- then it's discovery?

2 MR. JACOBS: Well, Your Honor, I would submit --

3 THE COURT: I just want to make sure I know what  
4 your orders are talking about.

5 MR. JACOBS: Yes, but I would submit that all of  
6 the orders that he has entered should apply with -- for  
7 example on deposing her clients, we have voluntarily adhered  
8 to his restriction, which was four hours in the first  
9 instance, supply the exhibits in advance. We've been doing  
10 that routinely across all of her cases, even just not -- not  
11 just the ones where she obtained that ruling.

12 But most importantly from our perspective it's the  
13 order that says -- Judge Moss very carefully with both of us  
14 present constructed a fact stipulation that was acceptable  
15 to us that also included Ms. Chaitman's withdrawal of  
16 certain affirmative defenses and if she were to agree to  
17 that language without equivocation then it would likely  
18 obviate the need for amended interrogatory responses and  
19 potentially some other categories of discovery.

20 Judge Moss asked that Ms. Chaitman indicate to us  
21 in each and every single case, I think it was in a ten-day  
22 time period if she would still consent, and she then took  
23 the position that she wasn't required to do so in any of the  
24 cases other than the handful that's stipulated.

25 THE COURT: The reason I keep coming back to this

1 is Judge Moss entered a lot of orders --

2 MR. JACOBS: Yes.

3 THE COURT: -- and I'm not sure I'm familiar with  
4 all of them, so I can't --

5 MR. JACOBS: Right.

6 THE COURT: I'm just focusing on the order -- the  
7 procedure which we've used in these cases anyway before  
8 Judge Moss, which was --

9 MR. JACOBS: Right.

10 THE COURT: -- if you stipulate to the withdrawals  
11 and the deposits --

12 MR. JACOBS: Right.

13 THE COURT: -- then you don't have to answer -- or  
14 we would deal with it in terms of subpoenas, third party  
15 subpoenas to the banks --

16 MR. JACOBS: Right.

17 THE COURT: -- but is that the order that you're  
18 talking about?

19 MR. JACOBS: Yes, although the order didn't  
20 pertain to bank subpoenas, it pertained to documents and  
21 information concerning her affirmative defenses.

22 THE COURT: Well, if she stipulates, you don't  
23 need any of that stuff.

24 MR. JACOBS: Right, but the problem is that Ms.  
25 Chaitman keeps advancing the same argument over and over

1 again, which Judge Moss has rejected and Your Honor rejected  
2 in the context of the bank subpoenas, which is I'm not  
3 contesting the ins and outs, but that doesn't get you much,  
4 it gets you something we already have independent  
5 confirmation of. Really we need the stipulation on that  
6 equity and the affirmative defenses are really the sticking  
7 point. She simply refuses to abandon these affirmative  
8 defenses on value, on tax payments and other payments, but  
9 won't provide any factual basis for any of those assertions.

10 In some cases she submitted a tax preparer's  
11 affidavit and at least in some case that tax preparer had no  
12 personal knowledge of what he was even averring to and in a  
13 deposition it came out that he in fact retracted. So, I  
14 mean, we have to have -- if we're not going to agree to a  
15 stip --

16 THE COURT: So what is the order that you want to  
17 apply to all cases?

18 MR. JACOBS: We would like the enforcement of  
19 Judge Moss' order where he stated that she should -- that  
20 Ms. Chaitman should have I think ten days to agree to the  
21 fact stipulation that he crafted without exception, and if  
22 not, then we would like an order compelling all outstanding  
23 discovery, including interrogatory answers and document  
24 productions on the issues of transfers, net equity and  
25 affirmative defenses.

1 THE COURT: Is that the January 9th order?

2 MR. JACOBS: Yes. Let me just confirm that date.

3 THE COURT: A couple of them are case-specific,  
4 the -- some of the provisions are case-specific.

5 MR. JACOBS: Right.

6 THE COURT: So you're just talking about the first  
7 seven paragraphs?

8 MR. JACOBS: That's correct, Your Honor. If it  
9 would be more helpful, we could submit a brief motion that  
10 would attach these orders and outline --

11 THE COURT: Well, are there others other than this  
12 one?

13 MR. JACOBS: There are many orders on a range of  
14 topics, but the one that applies to Ms. Chaitman's discovery  
15 deficiencies is this January 4th order.

16 MS. CHAITMAN: May I be heard, Your Honor?

17 THE COURT: Yes. I just want to make sure I know  
18 what orders we're talking about.

19 MR. JACOBS: January -- that January 9th order.

20 THE COURT: Okay. And it's the first seven  
21 paragraphs you're talking about?

22 MR. JACOBS: Yes. And then also -- yes. And then  
23 also in the Digiulian specifically, which was one of those  
24 cases dealt with, we had to go back to the arbitrator to  
25 enforce compliance with that -- with his January 9th order

1 and we obtained a sanctions order that precludes Ms.  
2 Chaitman from using evidence that she hadn't produced in a  
3 timely fashion. So we would like that order endorsed and  
4 enforced by the Court as well.

5 THE COURT: Why don't we -- I mean, that's already  
6 in the rules or there's a possibility of that in the rules.  
7 So that --

8 MR. JACOBS: Right.

9 THE COURT: -- can depend on a case-by-case --

10 MR. JACOBS: That's fair enough. Thank you.

11 THE COURT: -- issue. All right.

12 So the proposal is to make the first seven  
13 paragraphs of the January 4th order applicable in all cases.

14 MS. CHAITMAN: Your Honor, I don't have any  
15 problem with that. As I pointed out in my papers and as  
16 Exhibit G and H to my opposition show, the trustee wanted me  
17 to abide by Judge Moss' orders, but he didn't want to -- the  
18 trustee didn't want to abide by it. So in other words, if I  
19 said before a deposition please send me the deposition  
20 exhibits, they say they have no obligation to do it, even  
21 though Magistrate Judge Moss ordered it in the cases that  
22 were before it. So they pick and choose what they want to  
23 abide by.

24 But I would ask this, Your Honor. Since Judge  
25 Moss ordered in the one case where I inadvertently forgot to



1 produce a client's documents before a deposition that I  
2 would be barred from relying on those documents, I would ask  
3 that the Court order that the trustee is precluded from  
4 relying upon any of the trading records that were not  
5 produced until 2017.

6 THE COURT: I'm not going to in either case make a  
7 general ruling that somebody can't rely on something, I  
8 would have to know the circumstances, and there may be other  
9 sanctions that are more appropriate.

10 With respect to the first seven paragraphs though  
11 of the January 4th order, you've just said that you have  
12 objection --

13 MS. CHAITMAN: Correct.

14 THE COURT: -- to applying them to all cases.

15 MS. CHAITMAN: Correct.

16 THE COURT: All right, with the caveat that if  
17 somebody hasn't agreed to go before Judge Moss, they'll have  
18 to come here --

19 MR. JACOBS: Right.

20 THE COURT: -- for the enforcement of the order.

21 MR. JACOBS: Okay.

22 MS. CHAITMAN: And, Your Honor --

23 THE COURT: And you can submit -- you can --

24 MS. CHAITMAN: -- if I --

25 MR. JACOBS: Well, Ms. Chaitman --

1 MS. CHAITMAN: -- if I --

2 MR. JACOBS: -- will agree that any follow-up in  
3 all of your cases can go before Judge Moss and if so, we can  
4 prepare a stipulation to that effect and --

5 MS. CHAITMAN: No, I don't agree to that.

6 THE COURT: You know what? The stipulations are  
7 what's really tying this case up. I will direct that to the  
8 extent the parties have not already stipulated to go before  
9 Judge Moss --

10 MR. JACOBS: Right.

11 THE COURT: -- and unless they stipulate  
12 otherwise, you come here with any enforcement issues.

13 MR. JACOBS: Okay.

14 THE COURT: Okay?

15 MR. JACOBS: Thank you, Your Honor.

16 MS. CHAITMAN: And, Your Honor, that's exactly  
17 what you ruled on May 15th, 2017.

18 THE COURT: So at least I'm consistent, right?

19 MS. CHAITMAN: You're consistent.

20 THE COURT: All right.

21 MS. CHAITMAN: Congratulations.

22 THE COURT: Thank you.

23 MS. CHAITMAN: We're not finished with our issues,  
24 I don't know if Mr. Jacobs is finished.

25 MR. JACOBS: Well, I have one last request on this

1 issue.

2 THE COURT: What?

3 MR. JACOBS: I'm sorry, Your Honor, I apologize.

4 There's an additional paragraph from that order that we  
5 would also like to include in your order.

6 THE COURT: Which?

7 MR. JACOBS: It's paragraph (c)(1). So you just  
8 endorsed (a)(1) through (7), and in addition we're  
9 requesting (c)(1). So this is an issue about the tax  
10 preparer affidavits we discussed, I mentioned briefly. Ms.  
11 Chaitman has been supplying affidavits from tax preparers in  
12 a number of cases; some were served late, most were served  
13 without any documentary support. So we move to compel the  
14 production of the timely furnishing of those reports within  
15 fact discovery and also a production of any accompanying  
16 documents that support the claims being made in that fact  
17 affidavit, and also that the affiant may have looked at or  
18 relied upon in connection with the affidavit. And you can  
19 see in this paragraph Judge Moss ordered the production of  
20 those materials.

21 THE COURT: Any objection to that?

22 MS. CHAITMAN: We've been complying with Judge  
23 Moss' order even in cases that were not before him.

24 THE COURT: So you have no objection to that  
25 paragraph (1) coming --

1 MS. CHAITMAN: No, I have no objection to that.

2 THE COURT: All right, fine. You can submit an  
3 order that embodies that.

4 MR. JACOBS: Your Honor, those are the three  
5 issues that were formerly noticed and that the Court allowed  
6 hearings for today.

7 THE COURT: Okay. Yes?

8 MS. CHAITMAN: Judge, again, I would ask that the  
9 trustee be barred from relying upon any of the documents  
10 that he produced in 2017.

11 THE COURT: You know, that's a sanctions issue.  
12 You're going to have to make a specific motion in a specific  
13 case and explain why he should be barred in a particular  
14 case, and the same holds true --

15 MS. CHAITMAN: Okay.

16 THE COURT: -- for you. I'm not going to enter a  
17 general order like that --

18 MS. CHAITMAN: Okay.

19 THE COURT: -- it depends on the case.

20 MS. CHAITMAN: I'll make a specific motion.

21 THE COURT: Okay.

22 MS. CHAITMAN: And then the other thing that I had  
23 raised, Your Honor, was the trustee objected to our request  
24 for the production of indemnification agreements. Mr.  
25 Madoff had testified -- this goes to the issue of whether

1 Madoff --

2 THE COURT: This is with the four investors back  
3 in '80s?

4 MS. CHAITMAN: The four families.

5 THE COURT: Right.

6 MS. CHAITMAN: Mr. Madoff has testified about  
7 indemnification agreements which he valued at -- I can't  
8 remember if he said 10 or \$11 billion, and that's a huge  
9 balance sheet issue in terms of when Madoff was insolvent.  
10 And the trustee --

11 THE COURT: It doesn't sound like those  
12 indemnification agreements were worth very much though, huh?

13 MS. CHAITMAN: Well, they weren't enforced, but  
14 they could have been, I mean, presumably. In any event, we  
15 haven't been able to -- the trustee has not produced the  
16 indemnification agreements.

17 THE COURT: This is an issue I have raised before,  
18 what's the relevance of insolvency in these cases?

19 MR. JACOBS: Well --

20 THE COURT: The constructive fraudulent transfer  
21 claims are no longer part of the case --

22 MR. JACOBS: Right.

23 THE COURT: -- insolvency is not an issue on an  
24 intentional fraudulent transfer.

25 MR. JACOBS: I believe that -- I don't want to

1       overstep my authority, but I believe we agree with that  
2       statement on its face, Your Honor. But, however, I do  
3       believe there's case law that suggests that insolvency can  
4       also be a batch of fraud, so it also could be a factor or a  
5       consideration in connection with an overall fraud or a Ponzi  
6       scheme analysis. So I think it's indirectly relevant in  
7       that manner.

8               THE COURT: So then if it's relevant indirectly or  
9       directly, why isn't she entitled to the indemnification  
10      agreements?

11             MR. JACOBS: Well, what we did, Your Honor, is for  
12      precisely that consideration we made our objections, because  
13      we don't believe in the first instance it is relevant.  
14      However, I've given --

15             THE COURT: Well, it may be relevant to solvency,  
16      you're telling me that may be relevant.

17             MR. JACOBS: Right. Well, the only evidentiary  
18      authority for the fact that these agreements ever existed  
19      was Mr. Madoff's testimony. So we voluntarily undertook a  
20      search to try to identify any such agreements, which no one  
21      our team had ever seen or been familiar with in the past,  
22      but we couldn't find anything that would --

23             THE COURT: Why don't you just put in --

24             MR. JACOBS: -- remotely constitute that.

25             THE COURT: -- a two-paragraph affidavit from

1 somebody that says we searched and we never found them?

2 MR. JACOBS: We did, Your Honor, and --

3 THE COURT: Oh, you did?

4 MR. JACOBS: -- actually we served discovery  
5 responses where we specifically stated that notwithstanding  
6 our objections, we searched and couldn't find any --

7 THE COURT: All right.

8 MR. JACOBS: -- responsive documents and that was  
9 signed by me.

10 THE COURT: They don't have them.

11 MR. JACOBS: So I think that should end the  
12 inquiry.

13 MS. CHAITMAN: I mean, that's something that I'll  
14 have to ask Mr. Madoff about as to where they were when he  
15 confessed. I mean --

16 THE COURT: You can certainly ask him, I guess,  
17 but --

18 MS. CHAITMAN: Yeah. I mean, the trustee --

19 THE COURT: -- they're saying -- look, they're  
20 saying they don't have it, and they've gone on record in  
21 writing in saying they don't have it.

22 MS. CHAITMAN: They had gone on record to saying  
23 they had no pre-1992 trading records and they've produced  
24 millions of pages.

25 MR. JACOBS: That's again not true, Your Honor.

1 THE COURT: All right.

2 MR. JACOBS: Thank you.

3 THE COURT: Why don't we move on with the other  
4 cases, a couple of which are Ms. Chaitman's clients. They  
5 seem to be ready for trial.

6 (Pause)

7 THE COURT: Good morning.

8 MR. HUNT: Good morning, Your Honor, Dean Hunt for  
9 the trustee. I'm here on the two Nelson cases and they're  
10 Saren Lawrence case.

11 THE COURT: Let's start with Saren Lawrence.

12 MR. HUNT: Okay.

13 THE COURT: Is this case ready for trial?

14 MR. HUNT: Yes, Your Honor. The one clarification  
15 I want to just raise to make sure that we're consistent with  
16 your earlier rulings is fact discovery closed in all three  
17 of these cases in March of 2016, expert disclosures were due  
18 in May of 2016, and expert discovery closed in September of  
19 2016. All these cases are ready for trial, they've been  
20 fully mediated, and we're prepared to move forward.

21 THE COURT: Okay. How long do you think it will  
22 take you to put on your direct case?

23 MR. HUNT: We think it'll probably take, you know,  
24 two days, something like that.

25 THE COURT: Okay.



1 MS. CHAITMAN: A couple of points, Your Honor. I  
2 believe that, because expert discovery didn't close until  
3 September, expert discovery was open as of July 16th -- July  
4 6th, 2016, when you said that anyone --

5 THE COURT: But in this particular case, the fact  
6 discovery was closed. And I assume that this is not a case  
7 that participated or was eligible to participate in the  
8 Madoff deposition, right?

9 MR. HUNT: That's correct, Your Honor.

10 THE COURT: All right. So don't you have to put  
11 in an expert report?

12 MS. CHAITMAN: Here's the issue, Judge. On May  
13 17th, 2016, when I believe fact discovery was open in all 3  
14 of these cases, you ordered the trustee to put the documents  
15 in the e-data room.

16 THE COURT: Okay. So the first issue is whether  
17 fact discovery was still open in these cases.

18 MR. HUNT: Fact discovery closed specifically on  
19 March 14th.

20 THE COURT: That's in Saren-Lawrence?

21 MR. HUNT: In the Nelson cases and March 7th in  
22 the Saren-Lawrence case.

23 THE COURT: Okay. So fact discovery was closed.

24 MS. CHAITMAN: Your Honor, I'd like to look back  
25 at the date when I made the motion, which --

1 THE COURT: All right. Let's assume that that's  
2 the case.

3 MS. CHAITMAN: -- resulted in Your Honor's --

4 THE COURT: We can always check afterwards. So  
5 why not just put in an expert report in this case?

6 MR. HUNT: Ms. Chaitman actually did submit expert  
7 reports in this case.

8 THE COURT: Oh, okay. All right. So this case is  
9 ready for trial?

10 MS. CHAITMAN: Yeah, we're going to be making a  
11 motion to withdraw the reference, because the three --

12 THE COURT: Okay. Here's what I'm going to do.

13 MS. CHAITMAN: The three clients have asked for a  
14 jury trial.

15 THE COURT: I understand. So here's what I am  
16 going to do. Because if you never make that motion, you  
17 control the trial. So I'm going to schedule trials in these  
18 cases far out. Give you enough time to make the motion. If  
19 you make the motion, I'll obviously adjourn the trial 'til  
20 the District Court makes a determination.

21 But this way, I'm going to deem you to have waived  
22 the request for a jury trial if you don't make a motion  
23 before the date that I'm going to schedule for trial.

24 MS. CHAITMAN: No, I'll make the motion.

25 THE COURT: And I'll schedule it far out enough.

1 MR. HUNT: Your Honor, with respect to trial  
2 dates, we've consulted with our experts and have some  
3 potential dates that are available.

4 THE COURT: What are you potential dates?

5 MR. HUNT: So we have three cases. We think the  
6 Nelson cases can probably be handled pretty close to  
7 simultaneously.

8 THE COURT: They can be tried together?

9 MR. HUNT: I think so.

10 THE COURT: Is that Ms. Chaitman's case?

11 MR. HUNT: Yes.

12 THE COURT: Do you agree that those can be tried  
13 together, Ms. Chaitman?

14 MS. CHAITMAN: They're separate cases. They were  
15 two separate accounts. So I don't see any reason why they  
16 -- maybe the trustees never moved to decide (ph) it.

17 THE COURT: All right. All right.

18 Tell me the dates that your experts --

19 MR. HUNT: Okay. So dates that are available for  
20 us are September 26th through the 28th, October 3rd through  
21 the 5th, and October 31st, if you want to do it on  
22 Halloween, through November the 2nd.

23 THE COURT: The end of September is not a good  
24 time, but let me look at October.

25 (Pause)

1 THE COURT: All right. The Saren-Lawrence trial  
2 will begin --

3 MS. CHAITMAN: Judge, I think we're talking about  
4 Nelson.

5 THE COURT: It doesn't matter.

6 MR. HUNT: We're talking about all three.

7 THE COURT: There is --

8 MS. CHAITMAN: Okay.

9 THE COURT: I just have them in the order on my --

10 MS. CHAITMAN: No, that's fine. I don't care.

11 THE COURT: I expect you're going to make a motion  
12 to withdraw the reference anyway, right?

13 MS. CHAITMAN: I am.

14 THE COURT: So these are trial dates. But if you  
15 make the motion -- and let's say, so we don't wait 'til the  
16 last minute, that you have to make the motions within the  
17 next 30 days.

18 MS. CHAITMAN: Okay.

19 THE COURT: Because I have my calendar also that I  
20 want to make plain.

21 MS. CHAITMAN: Sure.

22 THE COURT: And you can submit orders in each of  
23 these cases. We'll schedule the Saren-Lawrence trial for  
24 October 3rd, 4th, and 5th. I'll have other matters on some  
25 of those days, but we'll just deal with them after the end

1 of trial matters, after the calendar matters.

2 (Pause)

3 THE COURT: Just if, as, and when you make these  
4 motions, just write me a letter so I know, and I'll know  
5 that the case will probably not be going forward.

6 MS. CHAITMAN: I will do that. I'll do it within  
7 the next 30 days, Your Honor.

8 THE COURT: With respect to -- I have two Nelson  
9 matters here. Have you distinguished them?

10 MR. HUNT: So there's one --

11 MS. CHAITMAN: One is an IRA account.

12 MR. HUNT: Yeah, there's one Carol Nelson matter  
13 and then one that --

14 THE COURT: Oh, I see. Carol. Okay.

15 MR. HUNT: -- involves both Ms. Nelson and her  
16 husband.

17 THE COURT: All right.

18 All right. The next one I have is the one  
19 involving Carol Nelson.

20 (Pause)

21 THE COURT: I'll give you that October 31st-11/2  
22 date.

23 MR. HUNT: Okay.

24 (Pause)

25 THE COURT: At 10 o'clock. I didn't mention.

1 Same rule. Make the motion to withdraw the reference within  
2 30 days. If you don't make it up in 30 days, I will deem  
3 that request for a jury trial to have been abandoned,  
4 because I have to maintain a calendar. And let me know if  
5 you make the motion.

6 And then you don't have availability dates for the  
7 other one?

8 MR. HUNT: No. If we're not going to do them  
9 together, we'd have to push those on into November some  
10 time. And I don't have specific dates that are available  
11 for our experts.

12 THE COURT: Right. Why don't you write to me  
13 beginning dates from them and then I will fix dates --

14 MR. HUNT: Okay.

15 THE COURT: -- for those trials?

16 MR. HUNT: And that would be for the Carol and  
17 Stanley Nelson case, correct?

18 THE COURT: It's 4658 is the number.

19 MR. HUNT: Okay, 4658 is Carol. So -- 4377 and --

20 THE COURT: Okay. I'm sorry. 4377 is the IRA,  
21 Mr. Nelson's IRA?

22 MS. CHAITMAN: No, it's the joint tenancy.

23 MR. HUNT: It's the joint tenancy case.

24 THE COURT: Right. 4377 the trial is October  
25 31st.

1 MR. HUNT: Okay. And then 4658 we'll let you know  
2 what date's available in November.

3 THE COURT: Right. Got it.

4 (Pause)

5 THE COURT: But provide in an order that you'll  
6 let me know, within some period of time. But you've still  
7 got to move to withdraw the reference within 30 days,  
8 because the cases are ready to go.

9 MR. HUNT: Okay.

10 THE COURT: And that will be up to the District  
11 Court to schedule the trial if the District Court grants the  
12 motion.

13 MR. HUNT: So that would be 30 days from today's  
14 date?

15 THE COURT: Thirty days from the date the order's  
16 entered.

17 MR. HUNT: The date the order is entered. Check.  
18 Got it.

19 THE COURT: Okay. Next we have Digiulian.

20 MS. HOCHMUTH: My name is Farrell Hochmuth. I'm  
21 here on behalf of the trustee on a motion to substitute an  
22 estate and its personal representative in the place of the  
23 deceased defendant, Bruno Digiulian. Counsel admits that  
24 motions to substitute are routinely granted. In fact, we've  
25 entered into numerous stipulations for substitution.

1 THE COURT: Nothing is routine in these cases.

2 MS. HOCHMUTH: Well-taken, Your Honor. We've  
3 stipulated on numerous occasions to substitute estates and  
4 personal representatives. Counsel's only objection to our  
5 motion to substitute is on the basis that she believes that  
6 the trustee cannot recover against the defendant, because  
7 the account was held by an IRA for the benefit of the  
8 deceased defendant. This defendant resided in Florida. And  
9 while Florida law does typically hold that an IRA is exempt  
10 from the claims of creditors, there is an exception to that  
11 rule when the account is funded with fraudulent conveyances,  
12 which is what happened here.

13 THE COURT: But you're not looking to enforce this  
14 judgment, if you get a judgment against an IRA account, are  
15 you?

16 MS. HOCHMUTH: No, Your Honor, we're looking to  
17 enforce the judgment against the estate and its personal  
18 representatives.

19 THE COURT: Okay.

20 MS. CHAITMAN: Your Honor, we filed a reply  
21 yesterday, May 30th. And I don't know if Your Honor has  
22 that.

23 THE COURT: I did.

24 MS. CHAITMAN: Okay. So under Florida law, we've  
25 cited in re: Goldberg and in re: Short (ph) for the



1 proposition that, if money is exempt, when it's taken out,  
2 it's also exempt. And the theory is --

3 THE COURT: But you know what those cases -- those  
4 cases are cases that allege that the person who owns the IRA  
5 or the pension account is the transferor. That's not the  
6 situation here. Here the account is a transferee account.  
7 And if the money were in the account still, then we'd have  
8 the issue of whether or not the trustee could, nonetheless,  
9 pursue it because of the fraudulent transfer statute, which  
10 I know mentions Florida law, not federal law. But that's  
11 not the situation here.

12 MS. CHAITMAN: Your Honor, obviously, the IRA was  
13 invested in Madoff. So it had no value as of December  
14 11th, 2008.

15 THE COURT: Right.

16 MS. CHAITMAN: But what the trustee is seeking to  
17 recover here is the money that Mr. Digiulian took out, as  
18 mandatory IRA withdrawals, in the years before he died.

19 THE COURT: I understand that.

20 MS. CHAITMAN: And the Florida law does not permit  
21 that. So --

22 THE COURT: But that's an exemption statute, isn't  
23 it? In other words, if he still had an IRA, --

24 MS. CHAITMAN: No, it covers money taken from an  
25 IRA. It protects --

1 THE COURT: Only if you can trace it, though,  
2 right? I've seen cases where you have to be able to trace  
3 it. I understand your argument that, if it's exempt and you  
4 take it out of an exempt IRA and you do something else with  
5 it, even if you put it in what would be a non-exempt asset.  
6 There are cases that say if you can trace it from the IRA  
7 account.

8 MS. CHAITMAN: Right. But here what the trustee  
9 is doing is seeking to recover from the estate for money  
10 that Mr. Digiulian took out to support himself as mandatory  
11 IRA withdrawals. And I'm convinced that, under Florida law,  
12 if we were in a Florida court, the Court would not permit  
13 it.

14 THE COURT: Well, I haven't seen any cases that  
15 say that, and I know that Judge Rakoff ruled on this in  
16 connection with federal law (indiscernible).

17 MS. CHAITMAN: Not under Florida law. He wasn't  
18 ruling under Florida law.

19 THE COURT: All right. I haven't seen -- I've  
20 looked. I haven't seen any cases that even deal with this  
21 issue. Remember that your client is being sued as a  
22 transferee, not as a -- it's not alleged that the client --  
23 your client made a fraudulent transfer.

24 MS. CHAITMAN: Well, if the estate is being sued  
25 as a transferee, --

1 THE COURT: Right.

2 MS. CHAITMAN: -- then, if that's what's really  
3 going on, then the case would have to be dismissed, based  
4 upon the Court's ruling on the motions to dismiss, because  
5 the subsequent transferee allegations are not present in the  
6 complaint.

7 THE COURT: No, no, no, no, the estate is the --  
8 well, Mr. Digiulian was a transferee of BLMIS.

9 MS. CHAITMAN: Right, and --

10 THE COURT: So if -- so maybe they --

11 MS. CHAITMAN: -- if --

12 THE COURT: Let me just finish. Maybe, if this  
13 account still existed, maybe the trustee couldn't enforce a  
14 judgment against that account, but they may have other non-  
15 exempt assets that they can enforce the judgment against.

16 MS. CHAITMAN: No. But if the estate is being  
17 sued as a subsequent transferee, --

18 THE COURT: It's not. It's being sued as a  
19 transferee of BLMIS.

20 MS. HOCHMUTH: That's correct, Your Honor. The  
21 estate steps into the shoes.

22 THE COURT: All right.

23 MS. HOCHMUTH: Thank you.

24 THE COURT: I just haven't seen any cases that  
25 support the theory that you are arguing, which is basically

1 that if somebody receives a fraudulent transfer and puts it  
2 into an exempt asset, that it's exempt. Somehow that's not  
3 a fraudulent transfer.

4 MS. CHAITMAN: Your Honor, the Florida cases on --

5 THE COURT: I read all your cases. They don't --

6 MS. CHAITMAN: Okay.

7 THE COURT: -- deal with that issue.

8 MS. CHAITMAN: The Florida cases on that issue are  
9 talking about the owner of the IRA account fraudulently  
10 transferring. What we have in this case is a legal creation  
11 of a fraud, which is obviously not the fraud of  
12 Mr. Digiulian.

13 THE COURT: Nobody's saying Mr. Digiulian  
14 committed fraud.

15 MS. CHAITMAN: Right. So the thing is --

16 THE COURT: He's an innocent transferee.

17 MS. CHAITMAN: Okay. But the point is he was  
18 entitled to all of the protections for his IRA account,  
19 under Florida law. And what the trustee is seeking to do is  
20 to enforce a liability which it couldn't enforce against  
21 Mr. Digiulian and enforce it against his estate.

22 THE COURT: First of all, let me ask you a basic  
23 question. Who do you represent?

24 MS. CHAITMAN: I represent Patsy Digiulian, who is  
25 --

1 THE COURT: But if she's not a party, how can you  
2 make a motion to dismiss the case?

3 MS. CHAITMAN: She --

4 THE COURT: You've objected to her substitution.  
5 So how can somebody who's not a party make a motion to  
6 dismiss a case?

7 MS. CHAITMAN: Is that the basis on which you --

8 THE COURT: I'm just asking you. I'm asking you a  
9 legal question, procedural question, whatever. Because that  
10 was my initial reaction when you opposed substitution. You  
11 were making a motion on behalf of somebody who's not a  
12 party.

13 MS. CHAITMAN: You know what, Judge? The trustees  
14 made this motion now. We've been operating in this case.  
15 They've known that Mr. Digiulian died for, you know, 17  
16 months or so. I can't remember exactly.

17 THE COURT: Yeah, but you haven't formally  
18 notified them, as required.

19 MS. CHAITMAN: Right.

20 THE COURT: All right. So --

21 MS. CHAITMAN: But they've known all this time.

22 THE COURT: Well, but they don't have to do  
23 anything until you give them the notice that they're  
24 entitled to, under the rules.

25 MS. CHAITMAN: So if you've -- if you grant their

1 motion to amend the caption, can I then make this motion  
2 again?

3 THE COURT: Okay.

4 MS. CHAITMAN: Or are you --

5 THE COURT: Well, I -- one, I'll just deal with it  
6 as a motion to dismiss. I'll grant the motion to  
7 substitute. I'll just deal with it as a motion to dismiss,  
8 if nobody has any objections. Well, it looks like it's been  
9 briefed, although I haven't seen -- as I said, I haven't  
10 seen any cases --

11 MS. CHAITMAN: Well, I'd like to deal with the  
12 subsequent transferee issue. So why don't we --

13 THE COURT: We're not -- this is not a subsequent  
14 transferee case, though. What's the subsequent transferee  
15 issue?

16 MS. CHAITMAN: If the allegation is that -- there  
17 was no estate proceeding in Florida, because there were no  
18 estate assets.

19 THE COURT: I understand.

20 MS. CHAITMAN: The trustee filed a claim, which  
21 forced Mrs. Digiulian to step in as executrix. So the only  
22 way the trustee could ever recover is to get a judgment  
23 against the estate, which has no assets, and then seek to  
24 sue a subsequent transferee.

25 THE COURT: Well, if the trustee wants to do that,

1 that's the trustee's option. You know, the trustee, like  
2 any litigant, will have to make a business determination  
3 whether it's worthwhile to do that, I suppose.

4 MS. HOCHMUTH: Your Honor, if I may?

5 THE COURT: But we're getting ahead of ourselves.  
6 The issue that you've raised is that, because of this  
7 exemption statute, anything that was received, put into that  
8 account can't be a fraudulent transfer. That's really what  
9 you're arguing.

10 MS. CHAITMAN: And also that you can't sue someone  
11 for having received and used the withdrawals from the IRA.

12 THE COURT: But that's not an issue in the case.  
13 In other words, the judgment, if the trustee recovered one,  
14 would not be based on Mr. Digiulian's transfer out of that  
15 account. It's based on BLMIS' transfer into the account.

16 (Pause)

17 MS. CHAITMAN: My reading of Florida law is that  
18 that's completely apart. It's like suing the IRA --

19 THE COURT: Tell me the case, and I will be happy  
20 to read it.

21 MS. CHAITMAN: But you've read all the cases that  
22 I've cited?

23 THE COURT: I have.

24 MS. CHAITMAN: And you -- okay.

25 THE COURT: Any other cases?

1 MS. CHAITMAN: Just the cases I've cited. I read  
2 them differently.

3 THE COURT: All right. All right.

4 MS. CHAITMAN: But I understand your --

5 THE COURT: Look, I'm going to grant the motion to  
6 substitute, and I'm going to deny the motion to dismiss the  
7 statute, which is Florida statute, I think, 221.21 or  
8 222.21.

9 MS. CHAITMAN: That's correct. 21. And the  
10 exemption is 222.29.

11 THE COURT: Right, is an exemption against  
12 collection? It has nothing to do -- and I dealt with this  
13 issue, I know, in the omnibus motion to dismiss, under New  
14 York law, though the law may be a little different. But  
15 it's an exemption against collection. It doesn't bullet-  
16 proof fraudulent transfers into the account.

17 And maybe or maybe not, in a hypothetical  
18 situation, a trustee could not enforce a judgment against  
19 the IRA account. The debtor may have -- or the transferee  
20 may have other assets which are non-exempt and against which  
21 a judgment could be canceled. The Florida statute, which  
22 has been relied on, as I said, is a judgment enforcement  
23 exemption statute or an exemption statute. So you can't  
24 collect from that account, and maybe you can't collect if  
25 money is transferred from that account, otherwise exempt



1 money is transferred from that account and it can be traced  
2 into some other non-exempt asset.

3 But that's not an issue before me, either. The  
4 transfers from BLMIS into that account -- the statute  
5 doesn't deal with that issue. As I noted, Judge Rakoff  
6 dealt with a similar issue in Greef (ph), when he was  
7 dealing with withdrawals from federal accounts. Although he  
8 was dealing with the fact that it was mandatory, it's still  
9 a withdrawal. So under the circumstances, the motion is  
10 denied. You can submit an order on that or the cross  
11 motions.

12 MS. CHAITMAN: Thank you, Your Honor.

13 THE COURT: By the way, there are no cross motions  
14 in federal practice. There are under the CPLR, but none of  
15 them in federal or civil procedures.

16 MS. CHAITMAN: Sorry, Judge.

17 THE COURT: All right. So the motion to  
18 substitute is granted. Motion to dismiss or cross motion to  
19 dismiss is denied, for reasons stated on the record.

20 All right.

21 MS. CHAITMAN: I think that's it for  
22 (indiscernible).

23 THE COURT: Okay, thank you.

24 Now we have one other interesting Madoff matter  
25 regarding a certification of -- the certification decision.

1 This doesn't involve you.

2 MS. CHAITMAN: This doesn't involve me, I think.

3 THE COURT: But you're welcome to stay.

4 MR. HUNT: Your Honor, just to -- procedurally, we  
5 also have the pretrial in the Goldenberg matter.

6 THE COURT: Oh, I'm sorry.

7 MR. HUNT: But I think --

8 THE COURT: Okay.

9 MR. HUNT: -- we can --

10 THE COURT: Let me just deal with that one first.

11 MR. HUNT: Yeah, it's a pretty quick one, I think.

12 THE COURT: It's just a question of scheduling a  
13 trial?

14 MR. HUNT: Yes, Your Honor, I think this is  
15 actually something that we could classify as being routine  
16 in these cases.

17 THE COURT: Oh, I forgot to mention, by the way,  
18 in those other cases -- Ms. Chaitman, don't leave yet.

19 MS. CHAITMAN: I'm sorry.

20 THE COURT: Exchange witness lists and pre-marked  
21 exhibits seven days before the scheduled beginning of the  
22 trial in each case. Plaintiffs can use numbers. Defendants  
23 can use letters. Okay?

24 MS. CHAITMAN: Okay.

25 THE COURT: And you can add that into the orders

1 also.

2 MS. CHAITMAN: Okay.

3 THE COURT: Okay. Goldenberg. This one is ready  
4 for trial?

5 MR. HUNT: Yes, Your Honor. So just to clarify on  
6 that one, discovery and mediation are complete. The parties  
7 are actually working on proposed stipulation of facts to  
8 move the case toward summary judgment. We expect we'll have  
9 that stipulation complete prior to the June omnibus hearing  
10 and would suggest that, in June, after we've submitted that  
11 to the Court, we can set a schedule for briefing.

12 THE COURT: What's the June date?

13 MR. HUNT: It's June 28th.

14 THE COURT: So you want to adjourn this to June  
15 28th while you're working on a stipulation?

16 MR. HUNT: That's correct, Your Honor. Yes, Your  
17 Honor.

18 THE COURT: Okay. Thanks.

19 MR. HUNT: Thank you, Your Honor. I appreciate  
20 it.

21 THE COURT: All right.

22 And we have the RBS matter.

23 (Pause)

24 THE COURT: All right.

25 MS. WOLTERING: Thank you. Good morning or

1 afternoon.

2 THE COURT: It's still morning.

3 MS. WOLTERING: Good morning. Catherine  
4 Woltering, of BakerHostetler, on behalf of the trustee,  
5 Irving Picard. We're here today at a conference regarding  
6 Your Honor's memorandum decision denying certification  
7 directed to the ABN AMRO Bank and the case now known as  
8 Royal Bank of Scotland. I'll probably refer to them as RBS  
9 -- and their party letter submissions concerning the --

10 THE COURT: I'll have to ask you to keep your  
11 voice up.

12 MS. WOLTERING: Oh, I apologize.

13 THE COURT: I'm getting -- we're getting some  
14 competition outside.

15 MS. WOLTERING: The parties' letter submissions  
16 following connection to settling the order and with respect  
17 to your decision. The trustee's position is laid out in his  
18 May 16th, 2017 letter. So I'll keep my comments brief and  
19 answer any questions you may have.

20 As you're aware, --

21 THE COURT: They say I had no jurisdiction to  
22 issue the decision. What's your position on that one?

23 MS. WOLTERING: As you're aware, we raised a  
24 timing concern regarding the Court's (indiscernible) in your  
25 Federal Rule of Bankruptcy Procedure 8006 to enter the

1 memorandum decision. We are now --

2 THE COURT: Or you are doing it, I should say,  
3 although --

4 MS. WOLTERING: Yeah.

5 THE COURT: -- the result is the same, I guess.

6 MS. WOLTERING: Yeah. And now to enter an order  
7 settling the same, the Court's authority to decide the  
8 certification motion from 28 U.S.C. 158(d)(2) and which  
9 Court has authority at which time is governed by 8006.  
10 However, there was a December 31st, 2014 amendment to the  
11 Federal Rules of Bankruptcy Procedure governing  
12 certification motions. This change is what's caused the  
13 issue resulting in today's hearing.

14 Prior to 2015 -- they're effectively 2015  
15 amendment, December 31st, 2014. It was a Rule 8001 that  
16 governed certification motions.

17 THE COURT: I know the history.

18 MS. WOLTERING: Okay.

19 THE COURT: You say I shouldn't have issued the  
20 decision. After 30 days, --

21 MS. WOLTERING: Correct.

22 THE COURT: -- I lost jurisdiction. And I guess  
23 you're arguing, although it's for the District Court to  
24 decide, that after the 31st day, the issue was -- or the  
25 motion for certification was automatically deemed vested in

1 the District Court, right?

2 MS. WOLTERING: Correct, Your Honor. It was  
3 pending.

4 THE COURT: I got it.

5 MS. WOLTERING: Okay.

6 MR. FELDBERG: Your Honor, the trustee argues --  
7 Michael Feldberg, from Allen & Overy, for Royal Bank of  
8 Scotland. Trustee argues in its May 16th letter that the  
9 Court's decision on certification is null and void because  
10 the Court lacked subject matter jurisdiction. Your Honor,  
11 there's no authority for the proposition that the Court  
12 lacked --

13 THE COURT: Well, but usually, once a notice of  
14 appeal is filed, whether it's prudential or otherwise, the  
15 lower Court loses its jurisdiction, that somehow this 30-day  
16 window is carved out in a -- to permit the certification --  
17 to permit the lower Court to decide the certification  
18 motion.

19 MR. FELDBERG: Your Honor, in the stipulated final  
20 order, the trustee stipulates that the Court has subject  
21 matter jurisdiction. I suspect what your --

22 THE COURT: But you can't consent to subject  
23 matter jurisdiction.

24 MR. FELDBERG: But there's simply no authority for  
25 the proposition that the Court lacks subject matter

1 jurisdiction, Your Honor. I suspect what the argument  
2 really boils down to is that Rule 8006(f) imposes a  
3 procedural limitation on the Court's authority to decide the  
4 certification questions. But in these facts, it doesn't.

5 Rule 8006(f) provides that -- actually, excuse me.  
6 8006(d) -- that only the Court where the matter is pending,  
7 as provided in subdivision (b), may certify a direct review  
8 on request of parties on its -- or on its own motion. The  
9 Court did not certify --

10 THE COURT: Oh, so you draw a distinction between  
11 certification and denial of certification?

12 MR. FELDBERG: Yes, I do, Your Honor, because the  
13 rule draws it.

14 THE COURT: And that would -- and you think that  
15 was within the purview of the rule-makers when they came up  
16 with this?

17 MR. FELDBERG: Your Honor, I've been at this too  
18 long to try to figure out what was in the purview of the  
19 rule-makers.

20 THE COURT: Well, I'm on that committee, but --

21 (Laughter)

22 MR. FELDBERG: I can tell Your Honor is way ahead  
23 of me on that. But --

24 THE COURT: Okay. I just wanted to -- fair  
25 warning before you said something.

1 (Laughter)

2 MR. FELDBERG: But in the areas the trustee frames  
3 its argument in terms of whether the Court had to decide the  
4 motion within 30 days. But that's not what the rule says.  
5 The rule says only the Court where the matter is pending.

6 THE COURT: But I thought on the 31st day, it's no  
7 longer pending here.

8 MR. FELDBERG: That's right. But Your Honor never  
9 certified. No Court has ever certified.

10 Now, to the extent that, under the trustee's  
11 reading of Rule 8006, there's some procedural limitation on  
12 the Court's ability to act. The procedural limitations are  
13 waived all the time. We cite some authority for the  
14 proposition in our May 18th letter. The trustee was on  
15 notice of this 30-day requirement at our March 29th hearing  
16 on certification.

17 The trustee's counsel raised the 30-day rule.  
18 Your Honor said, "Well, if you think you should, file a  
19 motion in the District Court within 30 days." They didn't  
20 do that.

21 Moreover, the matter is now moot, because of Rule  
22 8006(f). A request for certification must be filed with the  
23 clerk of the court where the matter is pending, wherever  
24 that court is, within 60 days after the entry of judgment.  
25 And we're considerably past 60 days.



1 THE COURT: But this is not really an argument for  
2 the District Court. In other words, you could argue to the  
3 District Court they had to file something in the District  
4 Court, not deemed filed something in the District Court  
5 within 60 days. And they didn't do it.

6 MR. FELDBERG: Yep, we could, and we're arguing  
7 that now here.

8 THE COURT: But isn't that really a decision for  
9 the District Court?

10 MR. FELDBERG: Not the way we read the rule, Your  
11 Honor. As we read it, Your Honor -- there's been no  
12 violation of any of the elements of Rule 8006 here. And the  
13 matter is before the District Court. If they want to renew  
14 a motion in the District Court, just to ask for some relief  
15 at the time this matter goes on to the District Court, I  
16 can't think of a way we could prevent that from happening.  
17 But as of now, this matter is in the District Court for  
18 review.

19 Final point, Your Honor, -- even if trustee were  
20 right on everything they say, the argument that Your Honor's  
21 decision is null and void, we think, is not the right  
22 argument.

23 THE COURT: Well, I would just vacate it.

24 MR. FELDBERG: Well, at a minimum, Your Honor, the  
25 Court that is most familiar with the matter that has been

1 through the briefing, has the history, has the familiarity  
2 with the facts and the law, at a minimum, has the authority  
3 to write something that is the functional equivalent of a  
4 report and recommendation, which the District Court could  
5 review and either follow or not in its discretion.

6 THE COURT: Well, but that is because I have  
7 jurisdiction. I have jurisdiction. I'll just issue the  
8 decision.

9 MR. FELDBERG: But we think you have jurisdiction,  
10 Your Honor. And we think the decision is --

11 THE COURT: All right.

12 MR. FELDBERG: Your Honor made it. Your Honor  
13 considered it. Your Honor determined not to certify, and  
14 there's been no violation of any of the provisions of Rule  
15 8006.

16 THE COURT: Right. Thank you.

17 MR. FELDBERG: Thanks.

18 MS. WOLTERING: Your Honor, if I may?

19 THE COURT: Briefly, yes.

20 MS. WOLTERING: Yeah, so in our letter, we cited  
21 one case, and the Great Town (ph) case is an example. In  
22 their reply letter, they stated the IMMC (ph) case, all  
23 standing for the proposition that Rule 60(f) requires us --  
24 or 8006(f) requires us to refile in the District Court or  
25 for the proposition that this is their interpretation of

1 8006 is correct. Since the time of our letter submissions,  
2 we've identified several other cases that are on point that  
3 have dealt with the rule since the amendment. And we  
4 actually have a chart of the cases and the relevant ECF  
5 numbers. Because I'm sure you can appreciate the dockets  
6 are quite complicated, and the decisions don't always refer  
7 to --

8 THE COURT: What is the chart that you have?

9 MS. WOLTERING: So we have a chart that just  
10 simply lists all the different cases --

11 THE COURT: Have you seen it?

12 MS. WOLTERING: -- where we've identified on point  
13 that dealt with 8006 since the amendment, beyond just the  
14 IMMC and Great Town cases, including the Energy Future  
15 Holdings case, which the District Court criticizes the  
16 trustee for filing their request the day after the  
17 Bankruptcy Court -- the expert in bankruptcy law and  
18 intimately familiar with the case lost her (indiscernible)  
19 but recognized that it was automatically deemed pending  
20 before the District Court. And it had jurisdiction to hear  
21 it. So it recognized that 8000(f) (sic) is when you file.  
22 The parties' obligations -- you don't have to refile. You  
23 just file once within the first 60 days.

24 8000(d) (sic) is when and which Court can hear it,  
25 as determined by the timing in 8006(b). Mr. Feldberg,

1 respectfully, hasn't submitted any authority contrary. So  
2 unless Your Honor has questions, we'll give you this chart  
3 for your own reference, if you want it, and to make your  
4 decision.

5 THE COURT: This chart has more authorities than  
6 were in your letter?

7 MS. WOLTERING: Correct.

8 THE COURT: All right.

9 I'll give you an opportunity to respond, if you  
10 want, Mr. Feldberg.

11 MS. WOLTERING: We provided this to him --

12 MR. FELDBERG: Not today, but --

13 MS. WOLTERING: We provided this to him yesterday  
14 as well.

15 THE COURT: Great.

16 MR. FELDBERG: Your Honor, they did provide the  
17 chart to us last night. We've reviewed it. We think each  
18 of the cases is distinguishable. We'll be happy --

19 THE COURT: I'd love to hear it.

20 MR. FELDBERG: If you'd rather have a letter, Your  
21 Honor, we'll submit it.

22 THE COURT: But -- yeah, I think a letter would  
23 make more sense. And also, if you have discovered any  
24 authorities of the proposition that they have to refile in  
25 the District Court after the 30 days, that would also be

1 relevant, obviously, to the inquiry.

2 MS. WOLTERING: Your Honor, may I approach?

3 THE COURT: Yes.

4 It's now Wednesday. Can you write me your reply  
5 by Friday?

6 MR. FELDBERG: Yes, Your Honor.

7 THE COURT: All right. And then the matter will  
8 be deemed submitted.

9 MR. FELDBERG: Thank you, Your Honor.

10 MS. WOLTERING: Thank you, Your Honor.

11 THE COURT: Thank you.

12 (Whereas, these proceedings were concluded at 11:52  
13 A.M.)

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C E R T I F I C A T I O N

We, Tracey Williams and Nicole Yawn, certify that the foregoing transcript is a true and accurate record of the proceedings.

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